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No. 93-950

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM EUGENE RUTLEDGE, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment's Double Jeopardy Clause prohibits a district court from ordering equitable and remedial relief against a fiduciary for breach of duty under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, because the breaches have previously resulted in a criminal conviction, partial debarment order, and order of restitution against the fiduciary.

2. Whether the Secretary of Labor retains his standing under Section 502(a) of ERISA, 29 U.S.C. 1132(a), to pursue an action against a fiduciary for breaches resulting in plan losses, after the Pension Benefit Guaranty Corporation terminates the pension plans at issue and becomes their trustee pursuant to statute.

3. Whether the United States has waived its sovereign immunity to suit under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, when the government files a civil ERISA action and the defendant alleges in a counterclaim for RICO damages that the government's pre-suit investigation amounted to racketeering activity.

4. Whether the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.*, provides for suppression of financial records pertaining to pension plans that the government has obtained without prior authorization from the plans' fiduciary.

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OPINIONS BELOW

The per curiam order of affirmance of the court of appeals (Pet. App. II) is unreported. The opinion of the district court (Pet. App. III) is reported at 807 F. Supp. 693.

JURISDICTION

The court of appeals entered its judgment on July 7, 1993. The petition for rehearing was denied on September 8, 1993. Pet. App. I. The petition for a writ of certiorari was filed on November 1, 1993. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1984 petitioner William E. Rutledge obtained control of the Lattimer-Stevens Company, and from that date until January 1990 he served as trustee of the company's two pension plans. Pet. App. III, at 2-3. Those plans were subject to the Employee Retirement Income Security Act of 1974 (ERISA), and petitioner was a fiduciary under that Act. Pet. 2; Pet. App. III, at 6. ERISA required petitioner to discharge his duties with respect to the plans solely in the interest of plan participants and beneficiaries and with a high degree of prudence. 29 U.S.C. 1104(a)(1) (1988 & Supp. IV 1992). ERISA also prohibited petitioner from dealing with plan assets in his own interest or causing the plans to engage in direct or indirect transactions with a "party in interest," a term that includes petitioner, the Lattimer-Stevens Company, and other corporations that petitioner controlled. Pet. App. III, at 5-6; see 29 U.S.C. 1002(14)(A), (C) and (G), 1106(a) and (b)(1).

In February 1988, petitioner made a deposit of $178,426 from the plans to the Lattimer-Stevens bank account. Pet. App. III, at 3. On September 21 of that year, he deposited to the company's account an additional $175,000 from the sale of a plan certificate of deposit. *Ibid.* On December 6, 1988, petitioner signed a check transferring $260,000 from one of the plans to Rutledge Industrial, a company in which he owned a controlling interest. *Ibid.* By January 1990, when petitioner sold the companies and the plans obtained a successor trustee, the plans' sole asset was a promissory note from Lattimer-Stevens for $680,000, at 10% annual interest, personally guaranteed by petitioner. *Id.* at 3-4. Lattimer-Stevens filed for

bankruptcy in March 1992 and did not repay the note. *Id.* at 4, 14.

2. In 1990 the Department of Labor investigated petitioner's activities as the plans' trustee. In January 1991, the Secretary filed a five-count complaint under ERISA, see Pet. App. III, at 4, alleging that in 1984 and 1985 petitioner had used plan assets to further his efforts to gain control of the Farmers & Merchants Bank of Centre, Alabama (F & M Bank), and to secure loans to himself and corporations that he controlled, and that he had made imprudent, undiversified investments on the plans' behalf. Record Excerpts (R.E.) Doc. 1. Those actions were alleged to have breached petitioner's fiduciary duties under Section 404(a)(1) of the Act, 29 U.S.C. 1104(a)(1), and to have constituted prohibited transactions in violation of Sections 406(a) and (b), 29 U.S.C. 1106(a) and (b). *Ibid.* The Secretary sought, *inter alia*, restitution of all losses to the plans, and a permanent injunction barring petitioner from serving as an ERISA fiduciary or service provider. Pet. App. III, at 4.

Petitioner responded to the complaint by suing a number of third parties, see Pet. App. IV, and by filing a counterclaim against the Secretary. R.E. Doc. 51. Counts one and two of the counterclaim alleged that in the investigation that preceded this suit, the Secretary had obtained petitioner's personal financial records from F & M Bank in violation of the Right to Financial Privacy Act of 1978 (RFPA), 12 U.S.C. 3401 *et seq.*, and had used those records to sue him. R.E. Doc. 51, at 2-5. Counts three and four of the counterclaim alleged that the Department of Labor had violated the Racketeer Influenced and Corrupt

Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, by engaging in racketeering activity with Stewart R. Dudley, a director of the F & M Bank and the plans' accountant (Pet. 4, 23, 50), with the purpose of defrauding petitioner through illicit receipt of his bank records. R.E. Doc. 51, at 6-8. In July 1991, the Secretary amended the complaint to add a sixth claim, alleging that petitioner, in violation of Section 406(a) and (b) of ERISA, had transferred most, if not all, of the plans' remaining assets to Lattimer-Stevens in 1988, in exchange for the promissory note described above. R.E. Doc. 85, at 11-13. Again, the Secretary sought restitution to the plans for the losses caused by this transaction, as well as a permanent injunction barring petitioner from serving as an ERISA fiduciary or service provider. *Id.* at 13-14.

3. In April 1992, after a jury had convicted petitioner on criminal charges of embezzlement from the plans and making false statements,[1] the district

[1] The jury convicted petitioner in February 1992 on two counts of embezzlement that involved his transfer of $175,000 and $260,000 from the plans to companies he controlled (see Pet. 20) and six counts of making false statements on loan applications involving the plans and on annual reports to the government concerning plan transactions (see Pet. 20). Pet. App. III, at 4. Although the jury acquitted petitioner of embezzling $178,426 from the plans (see Pet. 6-7), the district judge, who also presided over the civil proceedings in this case, found at petitioner's sentencing that the transfer of those funds from the plan to Lattimer-Stevens had occurred as alleged in February 1988. Pet. 21. The court subsequently sentenced petitioner to a term of imprisonment and ordered him to pay restitution to the plans of $697,689.90, an amount that represented the plans' losses on the unpaid promissory note, including interest to the date of sentencing. Pet. 8; Pet. App. III, at 4-5. The criminal conviction and sentence are pending on

court granted the Secretary's motion for summary judgment on Counts 1 and 2 of petitioner's counterclaim, which alleged violations of the Right to Financial Privacy Act. R.E. Doc. 128, at 1-2; see Pet. 7. The court concluded that the government had not violated the RFPA because it "sought and obtained only the records of Lattimer-Stevens Pension Plans," rather than petitioner's personal records, and that the RFPA does not in any event authorize suppression of records illegally obtained, the relief that petitioner had sought. R.E. Doc. 128, at 2.[2] The district court also dismissed counts three and four of petitioner's counterclaim, which alleged violations of RICO. It reasoned that "[t]he United States of America and the United States Department of Labor are immune from suits for damages" under RICO. *Ibid.*

In June 1992, petitioner was sentenced in the criminal proceedings, see note 1, *supra*, and the Pension Benefit Guaranty Corporation (PBGC) then terminated and became trustee of the Lattimer-Stevens plans pursuant to Section 4042(c) of ERISA, 29 U.S.C. 1342(c). Pet. 8. In July 1992, after the PBGC termination, the Secretary moved for summary judgment

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appeal. *United States* v. *Rutledge*, No. CR 92-N-113-S (N.D. Ala. 1992), appeal pending, No. 92-6548 (11th Cir.).

[2] In a subsequent memorandum opinion the district court explained that the RFPA protects only the records of "customers," and a customer under the statute is "any person or authorized representative of that person." Mem. Op. 2-3 (Apr. 22, 1992) (citing 12 U.S.C. 3401(5)). Since a person for RFPA purposes is only an "individual or partnership of five or fewer individuals," Mem. Op. 3 (citing 12 U.S.C. 3401(4)), the court concluded that the statute does not protect the records of employee benefit plans. Mem. Op. 3.

on Count 6 of his amended complaint concerning the 1988 transfer of plan assets in exchange for the $680,000 promissory note. *Id.* at 8-9. Petitioner moved to dismiss on the theory that entry of judgment following his criminal conviction would violate the Double Jeopardy Clause of the Fifth Amendment. He also argued that the PBGC rather than the Secretary was the proper party to seek recovery. Pet. App. III, at 7, 11.

In October 1992, the district court granted summary judgment in favor of the Secretary. Pet. App. III, at 1-16. The court pointed to the three transfers of plan assets to companies controlled by petitioner—$178,426 to Lattimer-Stevens in February 1988, $175,000 to the same company in September 1988, and $260,000 in December 1988 to Rutledge Industrial—and concluded that "[t]he undisputed evidence in this case * * * establish[es] that the defendant has violated 29 U.S.C. §§ 1106(a)(1)[(B)], (D), and 1106(b)(1), by transferring Plan assets to [companies] * * * in which [he] * * * had a substantial equity interest." Pet. App. III, at 10. The court observed that petitioner "d[id] not seriously contest * * * that he ha[d] violated his fiduciary responsibilities under ERISA" by causing the plans to engage in these prohibited transactions. *Id.* at 10-11. The court also rejected petitioner's argument that the Secretary was not the proper party to sue, explaining that Sections 502(a)(2) and (5) of ERISA specifically authorize the Secretary "to seek appropriate relief under 29 U.S.C. § 1109" and to "bring a civil action for injunctive or other appropriate relief to redress violations or enforce the provisions of ERISA." Pet. App. III, at 11.

The court also rejected petitioner's double jeopardy claim. It acknowledged that under *United States* v. *Halper*, 490 U.S. 435 (1989), "[t]he Double Jeopardy Clause prohibits the government from imposing a civil sanction that constitutes punishment when the defendant has already been punished for the same offense." Pet. App. III, at 11. But the court concluded that although the parties agreed that the conduct underlying the criminal and civil cases was the same, the civil judgment "d[id] not rise to the level of criminal punishment." *Id.* at 12. The court noted that the Secretary sought recovery under Section 409(a) of ERISA, 29 U.S.C. 1109(a), a "clearly remedial" provision that makes fiduciaries "personally liable" for any plan losses occasioned by their breaches. Pet. App. III, at 13. Moreover, in the court's view, the size of the award was remedial because it represented "the amount that the Plans have lost because of the defendant's prohibited transactions." *Id.* at 14.[3] The court also noted that despite the restitution order previously entered in the criminal proceedings (see note 1, *supra*), the judgment in the civil proceedings would not result in a double recovery because under the Victim and Witness Protection Act of 1982, 18 U.S.C. 3663(e)(2), "[a]ny amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in * * * any Federal civil proceeding." Pet. App. III, at 14.

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[3] The court calculated the losses as $680,000, "as evidenced by the unpaid promissory note," and added unpaid interest through October 1992. Pet. App. III, at 13-14 & n.1. Thus, the court ordered petitioner to pay $724,149.25. *Id.* at 15.

Finally, the district court granted the Secretary's request for a permanent injunction barring petitioner from service as an ERISA fiduciary. It noted the high standard that ERISA imposes upon fiduciaries and concluded that "serious misconduct that violates statutory obligation is sufficient grounds for a permanent injunction." Pet. App. III, at 15 (citing *Beck* v. *Levering*, 947 F.2d 639, 641 (2d Cir. 1991), cert. denied, 112 S. Ct. 1937 (1992)). The court entered its October 1992 judgment as a final order under Fed. R. Civ. P. 54(b) (Rec. Vol. 2, No. 144 (R2-144), at 2), and petitioner appealed.[4]

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. II.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court therefore is not warranted.

1. Petitioner does not dispute that he violated ERISA by transferring hundreds of thousands of dollars in plan assets to companies he controlled. Nor is there any dispute that he left the plans with no assets except a now worthless $680,000 promissory note from one of petitioner's companies. Pet. App. III, at 10-11. Instead, he argues that because the district court's October 1992 judgment followed his criminal convictions, it violated the Double Jeopardy Clause of

[4] On February 12, 1993, the district court dismissed with prejudice all pending claims by petitioner against the third parties he had sued and dismissed the Secretary's remaining claims against petitioner without prejudice to the Secretary's right to request reinstatement in the event that the court's order on summary judgment is reversed.

the Fifth Amendment as construed in *United States* v. *Halper*, 490 U.S. 435 (1989). Neither the restitutionary order nor the permanent injunction, however, implicates any of the double jeopardy concerns identified in *Halper*.

The Double Jeopardy Clause[5] "protects against multiple punishments for the same offense." *Schiro* v. *Farley*, No. 92-7549 (Jan. 19, 1994), slip. op. 7 (quoting *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969)). In *Halper*, this Court held that "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction * * * that * * * may not fairly be characterized as remedial, *but only as a deterrent or retribution*." 490 U.S. at 448-449 (emphasis added). The Court stressed, however, that it was announcing "a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449. The Court recognized that in the ordinary case, "fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole," because the government's damages are often difficult if not impossible to calculate and the government is entitled to rough remedial justice. *Id.* at 446, 449.

In this case, the monetary award is in no way "overwhelmingly disproportionate" to the damages petitioner caused. In fact, it corresponds exactly to the plans' losses, as the district court calculated

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[5] The Double Jeopardy Clause provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.

them, and therefore is plainly remedial. See *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 140 (1985) (monetary relief under Section 409(a) is available only to the plan). Petitioner's argument that the award is "penal" is nothing more than a disagreement with the district court's calculation of the amount of the plans' losses. We see no error in those calculations,[6] and in any event, the calculation of losses is a fact-bound issue that does not warrant this Court's attention. Nor does the remedial award become penal on the theory (Pet. 25) that the award adds nothing to the order of restitution imposed in the criminal proceedings against petitioner. The award ensures that the government can recover plan losses, while at the same time avoiding any double recovery against petitioner.[7] Whether or not this added method

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[6] Although petitioner now claims (Pet. 21) that the plans lost only $613,000 as a result of his misconduct, he himself submitted as evidence, in opposition to the Secretary's motion for summary judgment in this case, the trial court's determination at sentencing that the plans had lost at least $680,000 during the time in which petitioner was trustee. R2-140, Exh. 2, at 5.

[7] Petitioner does not dispute that under the Victim and Witness Protection Act, 18 U.S.C. 3663(e)(2)(A), any restitutionary amount paid to a victim in a criminal proceeding must be set off against any amount the Secretary later recovers under ERISA. See Pet. 25; Pet. App. III, at 14; *United States* v. *Fliegler*, 756 F. Supp. 688, 695 (E.D.N.Y. 1990); *United States* v. *Loesche*, 688 F. Supp. 649, 651 (Ct. Int'l Trade 1988); *Teachers Ins. & Annuity Ass'n* v. *Green*, 636 F. Supp. 415, 418 (S.D.N.Y. 1986); cf. *Beck* v. *Levering*, 947 F.2d 639, 642 (2d Cir. 1991) (no double recovery where Secretary and private plaintiffs win judgment against plan asset managers; amount won by Secretary "merely decreases the amounts recouped by

of recovery is, from petitioner's perspective, a sanction that "carr[ies] the sting of punishment" is immaterial to a determination of its purpose. *Halper*, 490 U.S. at 447 n.7.

Petitioner also errs in arguing (Pet. 26-28) that the permanent injunction barring him from serving as an ERISA fiduciary or service provider constitutes a second punishment that subjects him to double jeopardy. The purpose of such an injunction under Section 409 of ERISA, which authorizes the court to impose "such * * * equitable or remedial relief as [it] * * * deem[s] appropriate," 29 U.S.C. 1109(a), is not to punish, but to protect participants and beneficiaries from individuals likely to harm them in the future. See *Martin* v. *Feilen*, 965 F.2d 660, 672-673 (8th Cir. 1992), cert. denied, 113 S. Ct. 979 (1993); *Beck* v. *Levering*, 947 F.2d 639, 641 (2d Cir. 1991), cert. denied, 112 S. Ct. 1937 (1992); see also *Ex parte Wall*, 107 U.S. 265, 288 (1883) (attorney disbarment proceeding "is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them").[8]

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the Plans by the sums recovered by the private plaintiffs"), cert. denied, 112 S. Ct. 1937 (1992).

[8] Courts have uniformly held that a civil debarment order following a criminal conviction does not violate double jeopardy. *See, e.g., United States* v. *Furlett*, 974 F.2d 839 (7th Cir. 1992) (prohibition against trading on commodities markets); *Manocchio* v. *Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (exclusion of physician from Medicare participation); *United States* v. *Reed*, 937 F.2d 575 (11th Cir. 1991) (arbitral suspension from employment); *United States* v. *Bizzell*, 921 F.2d 263 (10th Cir. 1990) (exclusion from participation in HUD programs); *United States* v. *Naftalin*, 606 F.2d 809 (8th Cir. 1979) (prohibition against securities investment activities).

Nor is relief under Section 409 dependent upon a prior criminal conviction. Thus, contrary to petitioner's argument (Pet. 27-28), the 13-year, automatic debarment resulting from and dependent on his criminal conviction under Section 411, see 29 U.S.C. 1111, does not alter the remedial nature of the injunction at issue here; it merely underscores the need for the additional protection that a permanent injunction, enforceable through contempt proceedings, will provide.[9] Petitioner, like the permanently enjoined fiduciaries in *Beck* v. *Levering*, 947 F.2d at 641, engaged in "egregious self-dealing." Concrete proof of future wrongdoing is not required (see Pet. 28) because petitioner must not "be allowed to loot a second [company's] pension plan[s] before an injunction may be issued." *Beck*, 947 F.2d at 641.[10]

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[9] Petitioner argues (Pet. 28) that "[t]he immediate imposition of the debarment period specified in § 1111 without reference to an appeal of the criminal conviction stated a legislative decision as to the appropriate debarment period necessary to protect the interests with which the Government is concerned in this type of situation." Although petitioner frames this as a Double Jeopardy argument, it is in substance a statutory challenge: petitioner contends that the mandatory 13-year debarment specified in 29 U.S.C. 1111 implicitly limits the district court's authority to award appropriate equitable relief pursuant to 29 U.S.C. 1109(a). Petitioner cites no authority for that proposition, and we are aware of none.

[10] There is also no merit to petitioner's contention (Pet. 28-36) that the Double Jeopardy Clause's ban on "successive prosecutions" for the same offense bars a civil proceeding following a criminal trial for the same conduct. A civil proceeding is not a "prosecution" that adjudicates guilt or innocence, which can thereby subject a defendant to double jeopardy under a successive prosecutions analysis. See, *e.g.*, *Lockett* v. *Montemango*, 784 F.2d 78 (2d Cir.), cert. denied, 479 U.S. 832

2. Petitioner's subsidiary contentions (Pet. 36-53) do not warrant this Court's review. First, petitioner argues (Pet. 41) that the PBGC had exclusive authority to sue him for his ERISA violations once it became trustee pursuant to statute. That contention is meritless because, as the district court recognized, the plain language of Sections 502(a)(2) and (5) of ERISA, 29 U.S.C. 1132(a)(2) and (5), authorizes the Secretary to sue. The PBGC is a wholly owned government corporation established to administer the pension plan termination insurance program created by Title IV of the ERISA. See *PBGC* v. *LTV Corp.*, 496 U.S. 633, 636-637 (1990). The PBGC ordinarily does not have authority to bring an action against fiduciaries, because Section 502 does not list the PBGC as a party entitled to sue to redress fiduciary breaches. The PBGC obtained authority to sue when it terminated and became trustee of the plans at issue

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(1986); *United States ex rel. Fulton* v. *Franzen*, 659 F.2d 741, 743 (7th Cir. 1981), cert. denied, 455 U.S. 817 (1982); *United States* v. *Lasky*, 600 F.2d 765, 767 n.1 (9th Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *MacDonald*, 585 F.2d 1211, 1212 (4th Cir. 1978), cert. denied, 440 U.S. 961 (1979). Indeed, it is well settled that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission." *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984) (citing *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938)). Civil proceedings therefore routinely follow criminal prosecutions without implicating any double jeopardy concerns. See, *e.g.*, *United States* v. *Furlett*, *supra*; *Manocchio* v. *Kusserow*, *supra*; *United States* v. *Reed*, *supra*; *United States* v. *Bizzell*, *supra*. Indeed, 18 U.S.C. 3663(e)(2), which provides that restitution paid as part of a criminal sentence shall be set off against a later civil damages award, quite plainly contemplates the prospect of successive criminal and civil proceedings based upon the same wrongful conduct.

in this case pursuant to Section 4042(d)(1)(B)(iv) of ERISA, 29 U.S.C. 1342(d)(1)(B)(iv). See *PBGC* v. *Scherling*, 905 F.2d 173, 175-176 (8th Cir. 1990). That provision, however, does not purport to give the PBGC exclusive authority to sue, or to divest the Secretary of his authority under Sections 502(a)(2) and (5). See *Dole* v. *Lundberg*, 12 Employee Benefits Cas. (BNA) 1941, 1943 n.1 (N.D. Tex. 1990) (Secretary and PBGC both may sue to redress fiduciary breaches).[11]

Petitioner also contends (Pet. 42-53) that the court of appeals erroneously concluded that the Department of Labor is immune from suit under RICO and that it complied with the Right to Financial Privacy Act during its investigation of his activities. As an initial matter, it is not clear that the court of appeals actually addressed those issues. As discussed above, the district court decided these issues in non-final orders issued in April 1992. Petitioner sought to appeal those issues after the district court certified

[11] There is no merit to petitioner's contention (Pet. 40) that under Section 4042(f) of ERISA, 29 U.S.C. 1342(f), the proceedings in this case were automatically stayed when the PBGC became trustee. No application was made to any court "for the appointment of a trustee or the issuance of a decree" under Section 4042, as is required to trigger a stay under subsection (f). Moreover, the Secretary sued petitioner in his capacity as a fiduciary, and such suits are not among those subject to a stay under Section 4042(f). Petitioner's argument (Pet. 40-41), not raised below, that the Secretary is not the real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure, also has no basis. Rule 17(a) specifically empowers "a party authorized by statute" to maintain an action in his own name, and there can be no doubt that the Secretary is such a party under Section 502(a) of ERISA. See *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 694 (7th Cir. 1986) (en banc).

its October 1992 order granting summary judgment to the Secretary on Count 6 of his amended complaint, rather than wait until the court disposed of the remaining issues in the case in February 1993. The court of appeals' one-word affirmance does not say whether it rejected petitioner's RICO and financial privacy arguments on the merits or concluded that it lacked jurisdiction to entertain them.

In any event, petitioner's arguments are meritless. It is well established that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). A waiver of sovereign immunity "must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969); accord, *United States* v. *Idaho ex rel. Director, Dep't of Water Resources*, 113 S. Ct. 1893, 1896 (1993). As the lower courts have uniformly held, there is no such unequivocal expression of congressional intent to subject the federal government to liability under RICO. See *McNeily* v. *United States*, 6 F.3d 343, 350 (5th Cir. 1993); *Berger* v. *Pierce*, 933 F.2d 393, 397 (6th Cir. 1991); *United States* v. *Bonanno Org. Crime Family*, 879 F.2d 20, 23 (2d Cir. 1989); *Ungaro* v. *Desert Palace, Inc.*, 91-1 U.S. Tax Cas. (CCH) ¶ 50,294, at 88,171 (D. Nev. 1989); *Owen* v. *Resolution Trust Corp.*, 766 F. Supp. 1163, 1166 (S.D. Fla. 1991); *Wiley* v. *Federal Land Bank*, 657 F. Supp. 964 (S.D. Ind. 1987).[12] Indeed, the terms

[12] Petitioner erroneously cites cases (Pet. 44-45) for the proposition that state and local governments are subject to suit under RICO. Those cases hold only that employees of a state or local government can use public office as an "enterprise" that subjects the employees to RICO liability. Courts have held that

of the statute preclude such liability, since the government cannot engage in the "racketeering activity," see 18 U.S.C. 1962, required for a civil RICO action. See 18 U.S.C. 1961(1) (Supp. IV 1992) (racketeering activity requires that acts be "chargeable," "indictable," or "punishable" under various state and federal criminal provisions); *McNeily*, 6 F.3d at 350; *Berger*, 933 F.2d at 397.[13]

Petitioner attempts to avoid these precedents by arguing (Pet. 43) that his RICO claim is a compulsory counterclaim and that even if the government is generally immune from suit under RICO it has waived its immunity with respect to compulsory counterclaims. Whether or not the government waives immunity with respect to compulsory counterclaims is immaterial, however, because petitioner has not asserted such claims here. Courts have concluded that the government waives its immunity only "as to claims of the defendant which assert matters in recoupment—arising out of the same transaction or occurrence which is the subject matter of the government's suit, and to the extent of defeating the government's claim." *Frederick* v. *United States*, 386 F.2d 481, 488 (5th Cir. 1967). In

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RICO does not subject state and local governments themselves to civil liability. See, *e.g.*, *Lancaster Community Hosp.* v. *Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404-405 (9th Cir. 1991), cert. denied, 112 S. Ct. 1168 (1992); *Genty* v. *Resolution Trust Corp.*, 937 F.2d 899, 906-914 (3d Cir. 1991); *Biondolillo* v. *City of Sunrise*, 736 F. Supp. 258 (S.D. Fla. 1990).

[13] Whether or not RICO requires that the defendant, or defendant's acts, be culpable (see Pet. 45-46), is therefore of no moment, since "it is self-evident that a federal agency is not subject to state or federal criminal prosecution." *Berger*, 933 F.2d at 397.

this case, the complaint and counterclaim do not involve the same transaction or occurrence. The government's suit alleged fiduciary misconduct with respect to the plans between 1984 and 1988, while the counterclaim concerned the Department's 1990-1991 investigation of petitioner, and its purported use of financial records. See pp. 3-4, *supra*. Thus, the two actions have only a "tenuous and indirect" connection to each other. *EEOC* v. *First Nat'l Bank of Jackson*, 614 F.2d 1004, 1008 (5th Cir. 1980), cert. denied, 450 U.S. 917 (1981). In addition, while the Secretary sought disgorgement of profits and a permanent injunction for petitioner's fiduciary breaches, the counterclaim sought compensatory and treble damages for alleged misuse of financial records. For this reason as well, the counterclaim did not assert matters "to the extent of defeating the government's claim." See *Frederick*, 386 F.2d at 488.[14]

Finally, the district court correctly determined that the government did not violate the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.* The RFPA protects against a bank's unauthorized disclosure to the government of a customer's financial records, see 12 U.S.C. 3402, but courts have uniformly recognized that it does not shield from disclosure the records pertaining to a pension plan, or information derived from such records. See *Donovan* v. *National Bank of Alaska*, 696 F.2d 678, 683 (9th Cir. 1983); *Dole* v. *Pittsburgh Nat'l Bank*, 11 Employee Benefits Cas. (BNA) 1182, 1183 (W.D. Pa. 1989);

[14] There is no merit to petitioner's contention (Pet. 46) that the Secretary raised for the first time on appeal the fact that the counterclaim failed to state a claim under RICO. See R2-86; R2-87.

Schwab v. *United States Dep't of Labor*, 12 Employee Benefits Cas. (BNA) 2190, 2192 (W.D. Mo. 1990); Mem. Op. 1-3 (Apr. 22, 1992). The district court correctly applied those principles in determining that the Department of Labor did not violate petitioner's financial privacy because it obtained plan records rather than any of petitioner's personal records.

Petitioner does not challenge the foregoing principles, but instead argues (Pet. 48-52) that the district court misapplied them. That contention is meritless and in any event presents a purely factual issue that does not warrant this Court's review.[15] Relying on a district court decision that granted a preliminary injunction requiring future compliance with the RFPA, see Pet. 52 (citing *Hunt* v. *SEC*, 520 F. Supp. 580 (N.D. Tex. 1981)), petitioner also argues that the RFPA allows the suppression of records obtained in violation of the Act. The district court correctly held that the RFPA does not authorize that remedy. See, *e.g.*, *United States* v. *Davis*, 953 F.2d 1482, 1496 (10th

[15] Contrary to petitioner's assertion (Pet. 48), the Secretary submitted undisputed evidence to the district court that all of the documents alleged to have come from petitioner's personal banking records came instead from sources such as public files, and the plans' own bank records. See *Donovan* v. *National Bank of Alaska*, *supra*; *Dole* v. *Pittsburgh Nat'l Bank*, *supra*. Similarly, petitioner cannot now rely (Pet. 50-51) upon a check written to the plans for his purchase of stock on behalf of Lattimer-Stevens, for his claim that the government violated the RFPA. *Donovan* v. *National Bank of Alaska*, *supra*; *Schwab* v. *United States Dep't of Labor*, *supra*. Moreover, petitioner has never pointed to any documents allegedly obtained in violation of the RFPA during the government's criminal investigation, and the notes to which he now points (Pet. 49-50) contain information relating to bank loans involving the plans.

Cir.), cert. denied, 112 S. Ct. 2286 (1992); *United States* v. *Kington*, 801 F.2d 733, 738 (5th Cir. 1986), cert. denied, 481 U.S. 1014 (1987); *United States* v. *Frazin*, 780 F.2d 1461, 1466 (9th Cir.), cert. denied, 479 U.S. 844 (1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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